



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 355 OF 2012

CHRIS KABIRO T/A KABIRO NDAIGA

AND COMPANY ADVOCATES.....PLAINTIFF/APPLICANT

-VERSUS-

KIHINGO VILLAGE (WARIDI GARDENS)

LIMITED.....1ST DEFENDANT/RESPONDENT

WAGEMA LIMITED.....2ND DEFENDANT/RESPONDENT

MUGANDA WASILWA

T/A KEYSIAN AUCTIONEERS.....3RD DEFENDANT/RESPONDENT

AND

CIVIL CASE NO. 350 OF 2012

KIHINGO VILLAGE (WARIDI GARDENS) LIMITEDPLAINTIFF/APPLICANT

-VERSUS-

CHRIS KABIRO.....DEFENDANT/ RESPONDENT

R U L I N G

1. The first Notice of Motion is the one in **Civil Case No. 350 of 2012** dated **30th May 2012** while the second one is dated **31st May 2012** in **Civil Case No. 355 of 2012**.
2. The parties agreed that the Applications be heard simultaneously. The proceedings continued under Civil Case No. 355 of 2012 and the orders and directions therein applied to Civil Case No. 350 of 2012. Therefore, for purposes of this ruling the lead file will be Civil Case No. 355 of 2012.

3. The Plaintiff's Application is dated **31st May 2012** and is supported by his affidavit sworn on even date as well as the supplementary affidavit sworn by himself on **18th September 2012**.
4. The Plaintiff's Application seeks the following prayers:-
 1. *Spent.*
 2. ***THAT pending the hearing and determination of this suit, a temporary injunction be issued restraining the Defendants whether jointly and/or severally by themselves or through their officers, agents, servants and/or employees or any other person from occupying, using, selling, leasing, transferring, charging, pledging, alienating, tampering with, altering or otherwise howsoever dealing with House Number 1D Kihingo Village (Waridi Gardens) constructed on Land Reference Number 27754 Nairobi.***
 3. *Spent.*
 4. *Spent.*
 5. ***THAT a mandatory injunction be issued reinstating the Plaintiff to the suit property and compelling the 3rd Defendant and his principal, the 1st Defendant, whether jointly and/or severally by themselves or through their officers, agents, servants and/or employees or any other person to return all the goods that were illegally attached and carted away from the Plaintiff's house on 11th May, 2012 at the cost of the 1st and 3rd Defendants.***
 6. *Spent*
 7. *Spent*
 8. ***THAT the costs of carrying out the purported distress be borne by the 3rd Defendant/Respondent.***
 9. *Spent*
 10. ***THAT the Court be pleased to order that accounts be taken as between the Plaintiff and the 1st and 2nd Defendants.***
 11. ***THAT the costs of this application be borne by the Defendants.***
5. The Plaintiff's Application is disputed. The 1st Defendant filed its Replying Affidavit sworn by **James Ndung'u Gethenji** on **19th July 2012** while the 3rd Defendant filed its Replying Affidavit sworn by **Wasilwa Muganda** on **21st June 2012**. The 2nd Defendant filed Grounds of Opposition dated **19th November 2012** on even date.

Background

6. Sometime in 2007, the 2nd Defendant resolved to develop a high end residential estate comprising of 55 houses to be constructed on a part of Land Reference Number 3862 Nairobi (herein referred to as "the project"). The said estate would be known as Kihingo Village (Waridi Gardens). For this purpose, Land Reference Number 3862 Nairobi was sub-divided and a parcel known as Land Reference Number 27754 Nairobi measuring about 37 acres ("the Head Parcel") was excised there from for purposes of the project.
7. According to the Plaintiff, the 2nd Defendant incorporated the 1st Defendant as a special purpose vehicle for the purposes of carrying out the project. For the purposes of the project, the Plaintiff/Applicant was engaged as the Legal adviser on assorted legal matters relating to the project and as Advocates for the vendor in the sale of the houses. The Plaintiff avers that the 1st Defendant has since developed the aforesaid residential estate and sold 51 units. The remaining

- four units have been allocated to the directors of the 1st and 2nd Defendants.
8. It is pleaded by the Plaintiff that in the course of developing the project, it became apparent that the 1st Defendant could not honour its financial obligations to the Commercial Bank of Africa, the contractor, the suppliers and the professional consultants including the Plaintiff. In view of the 1st Defendant's inability to pay off its liabilities, the Plaintiff avers that the 1st and 2nd Defendants made a number of resolutions among them that they would allocate houses in the estate to such consultants as would be willing to take up houses, in lieu of fees. In that regard, the Plaintiff was allocated House Number 1D, the suit property herein. Pursuant to the said allocation, it is the Plaintiff's claim that a sale agreement dated **28th November 2007 ("herein the sale agreement")** was entered into amongst himself as the purchaser, the 2nd Defendant as the registered owner of the head parcel including the suit property and the 1st Defendant as the vendor and as a party who was in the process of acquiring ownership of the head parcel, including the suit property from the 2nd Defendant. The terms of the sale agreement are as stated at paragraph 18 (a) to (o) of the Plaintiff's Notice of Motion dated **31st May 2012**.
 9. As regards the purchase price, **Kshs. 29,960,000/=** was to be offset against legal fees due to the Plaintiff's firm and the balance of **Kshs. 12,840,000/=** was to be paid before completion. The initial value of the suit property was **Kshs. 42,800,000/=**. However, as is averred by the Plaintiff, the suit property was extensively varied at his request and on the express instructions of the 1st Defendant. The Plaintiff further avers that the total value of the house including all the variations is now at **kshs. 71,011,726.35**.
 10. The Plaintiff avers that he rendered legal services relating to the project and also acted for the 1st and 2nd Defendants in the sale of the houses constructed on the Head Parcel. It is the Plaintiff's contention that the legal fees payable in respect of the said services are in excess of **Kshs. 104,550,843.00**. The Plaintiff further avers that, in acknowledgement of the said services, the 1st Defendant issued four (4) Credit Notes for the sum of **Kshs. 37,678,919.24**. Each of the credit Notes aforesaid stated expressly that they were in respect of payment of the purchase price of the suit property. The Plaintiff also avers that he made cash payments totalling to **Kshs. 1,111,454/=** into the 1st Defendant's escrow account.
 11. It is the Plaintiff's contention that whatever balance he owes the 1st and 2nd Defendants should be offset against the amounts due to him from the said Defendants. In view of the forgoing, it is the Plaintiff's claim that he has complied with his obligations in so far as payment of the purchase price of the suit property is concerned and it is the 1st and 2nd Defendants who owe him money.
 12. The Plaintiff avers that the 1st Defendant delivered possession of the suit property to him in September 2011 in recognition of the fact that he had fully paid the purchase price. However, it is the Plaintiff's contention that in breach of their joint and several obligations under the sale agreement, the 1st and 2nd Defendants have refused and/or failed to transfer the suit property to him.
 13. The Plaintiff further avers that the 1st Defendant purported to evict him from the suit property without any Court Order. In that regard, the 3rd Defendant allegedly on instructions of the 1st Defendant, filed a miscellaneous application in the Chief Magistrate's Court and obtained an order for police assistance in levying distress for rent in the suit property. The Plaintiff avers that the Defendants claimed that he owed the 1st Defendant a sum of over **Kshs. 7,400,000/=** in rent arrears.
 14. It is the Plaintiff's contention that the purported distress was illegal in that he was the purchaser of the said house and not a tenant and therefore no distress could be levied against him. It is also the Plaintiff's contention that no Notice had been issued and no proclamation was done prior to the purported distress.
 15. It is the Plaintiff's case that on **11th May 2012**, and following his application for review of the Orders granted in favour of the 1st and 3rd Defendants, the Court issued orders, *inter alia*,

reinstating him to the suit property and ordering that all items carted away from the house be returned immediately. The Plaintiff avers that the 1st and 3rd Defendants have blatantly disobeyed the said orders and have persisted in locking him out of the house while retaining his assets. The 1st and 3rd Defendants have insisted that the said Court order of 11th May 2012 was not personally served on them. It is the foregoing circumstances that have led the Plaintiff to file the current application.

16. The Plaintiff's application is vehemently opposed vide the 1st Defendant's Replying affidavit sworn on **19th July 2012** and a further Replying Affidavit sworn on **11th October 2012** by **James Ndung'u Gethenji**, a director of the 1st Defendant. In the said replying affidavit, the deponent also adopted his supporting affidavit sworn on **30th May 2012** and filed in **HCCC No. 350 of 2012**. The deponent states that the 2nd Defendant is not the developer of the high end residential estate comprising of the 55 houses constructed on Land Reference Number 27754 and known as Kihingo Village. He also denies that the 2nd Defendant incorporated the 1st Defendant as a special purpose vehicle for purposes of carrying the development of the said estate.
17. The deponent avers that it was the Plaintiff's desire from the outset, to purchase a house in lieu of his legal fees. However, it is averred on behalf of the 1st Defendant that the Agreement for Lease dated **28th November 2007** in respect of the purchase of house number 1D, the suit property herein, is presently the subject of investigations by the police for suspected forgery. The deponent further avers that the said agreement has been repudiated due to fraud and fundamental breaches.
18. It is also averred that, sometimes in early 2011 when the construction of the suit property was nearing completion, the 1st Defendant discovered that in the course of the construction of the said property, the Plaintiff had substantially and fundamentally changed the original designs and specifications of the suit property. Consequently, the 1st Defendant incurred extra costs in the construction of the same. It is the deponents contention that the said variations to the original design and plan were done by the Plaintiff without obtaining approval of the 1st Defendant as was required under the terms of the sale. He avers that there existed clear and mandatory prerequisites to be fulfilled before any variations on designs, plans or specifications of any house could be allowed and effected. He further avers that the Plaintiff was fully conversant with the said prerequisites as he had personally developed them together with other consultants.
19. The deponent avers that as a consequence of the said unauthorized, non-contractual, illegal and fraudulent variations to the original design, plan and specifications of the suit property the value of the said house changed tremendously from the original value of **Kshs. 42,800,000/=** to **Kshs.98,293,462/=** as of **June 2011** but which value now stands at **Kshs. 150,000,000/=**.
20. He further avers that it is misleading for the Plaintiff to aver that the 1st Defendant owes him a sum of **Kshs.66,871,924.07** in outstanding legal fees since the said legal fees are alleged to arise from services rendered by the Plaintiff to the 1st Defendant and other parties. The deponent denies that possession of the suit property was given to the Plaintiff in recognition of his having paid the full purchase price. It is the 1st Defendant's case that the Plaintiff subjected it to undue and sustained pressure demanding that the 1st Defendant hands over possession of the suit property to him. The 1st Defendant yielded to the said pressure and the Plaintiff took possession on **18th June 2011**.
21. It is also the 1st Defendant's case that they did not decline to execute the lease for the suit property in favour of the Plaintiff. The 1st Defendant's position is that the Plaintiff never paid the full purchase price for the property to entitle him to a lease for the same and the agreement in respect of the sale of the suit property has been rescinded.
22. The deponent avers that shortly after the Plaintiff took possession of the suit property, the 1st Defendant discovered that it did not have an Agreement for Lease in respect of the suit property in its custody. When the 1st Defendant called for the same, the Plaintiff claimed that the original Agreement for Lease was in the 1st Defendant's custody. The Plaintiff forwarded to the 1st

- Defendant a Photostat copy of the said Agreement purportedly executed by the parties on **28th November 2007**. It is the 1st Defendant's case that upon careful perusal and examination of the said Photostat copy it discovered several anomalies which raised suspicion on the authenticity of the said document.
23. By a letter dated **17th November 2011**, the Plaintiff notified the 1st Defendant that it had ceased acting for the 1st Defendant and other affiliate companies. By the said letter, the Plaintiff gave to the 1st Defendant a "final Report" on all matters he was handling on its behalf and of the said affiliate companies. The Plaintiff also admitted that though he was in possession of the suit property, ownership documentation in respect thereof had not been completed.
24. It is deponed that the 1st Defendant took an in-depth analysis of the Plaintiff's said final report which revealed that the Plaintiff had not accounted to the 1st Defendant for funds received by him on trust for and on account of the 1st Defendant amounting to **Kshs. 89,772,597.66**. It is deponed on behalf of the 1st Defendant that the aforesaid circumstances amount to gross breach of trust and or outright theft by agent. The 1st Defendant further commissioned an audit on the Project Valuations and Financial Accounts for the entire project which revealed a web of suspected conspiracy and fraud encompassing the Plaintiff, the contractor and other project consultants. It is the 1st Defendant's case that it has made legitimate criminal complaints of forgery, conspiracy to defraud and theft by agent against the Plaintiff.
25. The deponent avers that the 1st Defendant has not evicted the Plaintiff from the suit premises. On the contrary, the 1st Defendant levied distress against the Plaintiff culminating into an attachment of the Plaintiff's goods on **11th May 2012**. It is the 1st Defendant's case that by a letter dated **12th March 2012**, it notified the Plaintiff of its Board decision to repudiate the sale of the suit property for lack of a legally binding contract and also because the sale was tainted with fraud and illegality. The 1st Defendant further notified the Plaintiff that his occupation of the suit property was illegal and untenable and demanded immediate surrender of possession. The 1st Defendant further demanded that the Plaintiff should pay rent at the market rate of **USD \$ 7,000.00** per month for the period he had been in occupation of the property.
26. It is averred that when the Plaintiff failed to act on the 1st Defendant's aforesaid demands, the 1st Defendant's board of directors resolved to issue instructions to its Advocates on record herein to levy distress for the rent arrears amounting to **USD \$91,000.00**. By a letter dated **10th April 2012** addressed to the 3rd defendant herein and copied to the 1st Defendant, the Advocates instructed the 3rd Defendant to levy distress against the Plaintiff. The 1st Defendant avers that the auctioneers carried out a proclamation. It is further averred that on **11th May 2012** the auctioneers conducted the attachment under the watch of the police security.
27. It is the 1st Defendant's case that the Plaintiff has no proprietary and or beneficial rights over the suit property as his alleged beneficial interest of a purchaser was procured by illegal, fraudulent and criminal means. It is reiterated on behalf of the 1st Defendant that although initially there was a genuine intention on its part to sell the suit property to the Plaintiff there is no valid and legally binding agreement for lease between it and the Plaintiff to give effect to the sale.
28. The 2nd Defendant filed a Grounds of Opposition dated **19th November 2012** in opposition to the Plaintiff's application. It is averred on behalf of the 2nd Defendant that there is no complaint or cause of action made or disclosed as against the 2nd Defendant in relation to the application and the orders sought therein. It is further averred that the 2nd Defendant should not be burdened with any order including an order for costs in relation thereto.
29. The Plaintiff's application is also opposed by the 3rd Defendant who filed a Replying affidavit sworn on **21st June 2012** on even date. The 3rd Defendant also filed a Further Replying affidavit sworn on **9th October 2012**. The 3rd Defendant admits that on **10th April 2012** he received instructions from M/s Odhiambo & Weda Advocates acting for the 1st and 2nd Defendants to levy distress for rent against the Plaintiff on the suit property. Subsequently, on **11th April 2012** he

served the mandatory fourteen (14) days notice upon the Plaintiff by way of proclamation of motor vehicles and the attachable household goods. He avers that he only filed **Misc Application Number 341 of 2012** dated **9th May 2012** at the Chief Magistrates Court after strenuously trying to meet the Plaintiff and remove the distressed goods after the fourteen (14) days had lapsed.

30. The 3rd Defendant asserts that the approximate value of the goods attached is roughly **Kshs. 4,886,000/=** and not **Kshs. 50,000,000/=** as stated by the Plaintiff. He further asserts that he was not served with the Order of **11th May 2012** and only became aware of the same through the Advocates of the 1st and 2nd Defendants. The 3rd Defendant avers that on being informed of the order, he instructed his Advocates to file the Application dated 15th May 2012 for a review and/or stay of the decision made by the Honourable court in granting the said Orders. He further avers that on or about **31st May 2012** the Court subsequently held that the Orders made on **11th May 2012** were a nullity as the Court lacked jurisdiction.

31. It is the 3rd Defendant's case that the Distress for rent was carried out within the confines of the law in the presence of Police officers and the Plaintiff's representatives.

Summary of Submissions

Plaintiff's submissions

32. The Plaintiff's submissions in respect of his Notice of Motion dated **31st May 2012** and the 1st Defendant's Notice of Motion dated **30th May 2012** is dated **2nd October 2011** and was filed on **3rd October 2011**.

33. It is the Plaintiff's submission that he was given vacant possession of the suit property by the 1st Defendant in **August 2011** pursuant to the sale Agreement between them which has been performed substantially. However, as is submitted on behalf of the Plaintiff, on **11th May 2012** the 1st Defendant through the 3rd Defendant, evicted the Plaintiff from the suit property illegally and in total disregard of the law.

34. It is submitted on behalf of the Plaintiff that from the outset the houses comprising Kihingo Estate, including the suit property, were constructed for purposes of sale and not for leasing. It is further submitted that it was expressly agreed that the purchase price for the house was to be offset from legal fees projected to be earned by the Plaintiff as Advocate for the 1st and 2nd Defendants. According to the Plaintiff, upon taking of accounts it will emerge that the value of the work done for the 1st and 2nd Defendants is not less than **Kshs. 104,550,843.00**.

35. On the issue of the variations carried out on the suit property, it is submitted that the said variations were carried out at the request of the Plaintiff and with the consent of the 1st Defendant. It is also submitted that the varied drawings in respect of the suit property were drawn by the 1st Defendant's Architects. Therefore, it is the Plaintiff's submission that it is a blatant untruth for the 1st Defendant to allege that it only came to learn of the variations in 2011. The Plaintiff maintains that the suit property was one of the special houses and not a typical Dafina house. To this effect, Counsel referred to correspondence on the variations at pages 373 to 428 of the attachments to the Plaintiff's supporting affidavit.

36. It is submitted that in view of the work done by the Plaintiff *vis-a-vis* the value of the suit property, the Plaintiff has fully paid for the purchase price of the suit property and is indeed owed money by the 1st and 2nd Defendants. However, according to the Plaintiff's submissions the 1st Defendant has escalated the dispute by contriving a tenancy arrangement where none existed and proceeded to take the law into its hands by illegally distraining against the Plaintiff's goods and purporting to illegally evict the Plaintiff from the suit property.

37. It is also submitted that the Plaintiff entered the suit property as a purchaser and not as a tenant because there was no tenancy agreement between the Plaintiff and the 1st Defendant and no rent was ever paid or demanded prior to the purported distress.

38. The 1st Defendant annexed a letter dated **12th March 2012** purportedly in support of the contention that the Plaintiff was a tenant. It is submitted that the said letter was never served on the Plaintiff. It is the Plaintiff's belief that the said letter was manufactured after the purported distress and eviction so as to cover for the illegal act of distress and eviction. It is further submitted that the purported distress was actually an eviction in disguise. The 1st Defendant has since locked the suit property and the Plaintiff does not have access to the suit property. The Plaintiff also does not have access to the estate which is controlled by a smart card system.
39. The Plaintiff's case is that he was illegally evicted from the suit property and from the entire estate. The Plaintiff denies moving out of the suit property on social considerations. The plaintiff further avers that he has not refused to pay for the variations. What the Plaintiff is asking for is that accounts be taken to ascertain who, between the Plaintiff on the one hand and the 1st and 2nd defendants on the other hand, owes the other what money. According to the Plaintiff, upon taking of accounts it will emerge that the monies owed by the 1st and 2nd Defendants to the Plaintiff are sufficient to pay the purchase price in respect of the suit property together with the variations. It is also the Plaintiff's averment that he has prepared a Bill of Costs in respect of the work done for the 1st and 2nd Defendants valued at Kshs. 226, 000, 000.
40. As regards possession, it is submitted that the Plaintiff merely asked for possession upon honouring his part of the bargain by rendering legal services for a value in excess of the value of the suit property. It is further submitted that possession given by the 1st Defendant freely and unconditionally cannot thereafter be termed illegal. It is also submitted that it is inconsistent for the 1st Defendant to term possession illegal and thereafter claim that the said possession constituted a tenancy relationship and purport to levy distress.
41. It is submitted that the Plaintiff has established a *prima facie* case with a probability of success. It is the Plaintiff's submission that there is no tenancy agreement between him and the 1st Defendant and that there has never been any agreement on such fundamental terms as the rent, the period of the tenancy and the applicable terms and conditions. It is further submitted that without any evidence of a tenancy and agreed rent, the 1st Defendant would not be entitled to levy distress. The Plaintiff relied on the case of **GOLDLINE LIMITED VS GIATHINWA FARMERS COMPANY LIMITED AND ANOTHER, NRB HCCC NO. 371 OF 2003**, in which the High Court stated as follows:-

“Distress is the right of the Landlord as soon as rent is due and unpaid to enter the premises by himself, his servants or Court Bailiff on his behalf and impound any chattels found therein for the value of the rent due so long as they are not privileged. But a relationship of landlord and tenant must exist... it is illegal to distress where rent is not due or where it is irregular and excessive.”

1st Defendant's submissions

42. The 1st Defendant contends that it is the owner of the suit property and that title has not passed to the Plaintiff. It is submitted on behalf of the 1st Defendant that the Plaintiff obtained possession of the suit property unlawfully hence was in occupation of the suit property for the said period of eight months unlawfully. According to the 1st Defendant, the said unlawful occupation created an implied tenancy relationship which in turn gave it the right to levy distress. It is therefore submitted that the distress levied against the Plaintiff on **11th May 2012** was lawful.
43. It is further submitted that the Agreement for Lease which the Plaintiff relies on in support of his rights of ownership is a forgery hence incapable of affording parties thereto any legal rights. The 1st Defendant goes ahead to examine some salient terms of the Agreement in the event that the said Agreement is valid. It is submitted that whereas the parties agreed that one of the source of the monies to be used by the Plaintiff to pay for the purchase price was legal fees that would become due to the Plaintiff from the 1st Defendant, the amount was expressly limited to **Kshs. 29,960,000/=**.

44. It is the 1st Defendant's submission that it is outrightly wrong for the Plaintiff to take a general position that the entire purchase price was to be financed by a set-off from legal fees due to him. The 1st Defendant maintains that only part of the purchase price was to be financed by the said set-off against legal fees. According to the 1st Defendant's submissions, the purchase price to be paid by means of set-off was limited because the Plaintiff did not only provide legal services to the 1st Defendant but to other companies as well as the Estate of the Joseph Augustine Gethenji. The 1st Defendant submits that the Plaintiff has not paid the full purchase price and therefore has not acquired ownership of the suit property.

45. The 1st Defendant further submits that the Plaintiff was in possession of the suit property unlawfully. The 1st Defendant referred to clause 4.7 of the Agreement for Lease which provides as follows:

"4.7 The Lessee shall not be entitled to possession of the property until payment in full of the stand premium together with all other charges and outgoings as shall be notified to him by the Lessor as payable."

46. It is the 1st Defendant's submission that the Plaintiff took possession in clear breach of the foregoing provisions since he had not paid the purchase price in full. It is submitted that the Plaintiff subjected the 1st Defendant to duress and undue influence in order to gain possession. It is further submitted that the possibility of the Plaintiff unduly influencing the decisions of the 1st Defendant on purely legal matters was obvious, since he and the 1st Defendant had an Advocate-Client relationship.

47. It is the 1st Defendant's submission that if the Plaintiff was not in occupation of the suit property as owner, then he could only be in occupation as a tenant. It is further submitted that the Plaintiff having taken occupation unlawfully and derived benefit from the said occupation, equity would demand that he pays rent for the period of the unlawful occupation. Arising from the foregoing, it is submitted that instructions to levy distress was lawfully given by the 1st Defendant to its Advocates who in turn duly instructed the 3rd Defendant to levy the distress. The 3rd Defendant carried out a proclamation on **11th April 2012**.

48. The 1st Defendant also submits that not all goods were attached and/or carted away during the attachment including non-attachable goods. It is the 1st Defendant's submission that the foregoing became apparent on **22nd June 2012** when parties together with their Advocates made an impromptu visit to the suit property. During the said visit the parties found several goods including non-attachable wares inside the suit property.

49. With regard to eviction from the suit property, the 1st Defendant denies the allegations that it has denied the Plaintiff access to the suit property by deactivating the Plaintiff's automated swipe card. It is submitted that access to the Estate via the use of swipe cards is under the control of a Management Company. According to the 1st Defendant, the Plaintiff moved out of the suit property purely on social considerations.

50. It is the 1st Defendant's submission that the Plaintiff has not established a *prima facie* case as he has not availed the evidence to prove ownership of the suit property.

3rd Defendant

51. The 3rd Defendant filed its submissions on **11th October 2012**. Counsel for the 3rd Defendant submits that the Distress for rent was legal and carried out within the confines of the law. It is submitted that the 3rd Defendant carried out the Distress for rent on the basis of the Court order issued on **9th May 2012** and an instruction letter from M/S Odhiambo & Weda Advocates. It is further submitted that no non-distrainable goods were ever attached during the attachment of the Plaintiff's property.

52. The Plaintiff and the 1st Defendant filed various lists of authorities in support of their respective cases which I have considered. The parties herein highlighted their submissions before this Honourable Court on various dates.

ANALYSIS

53. From the foregoing, it is evident that this matter is highly contested. However, this court is of the view that the following are the main issues for determination:-

- a. *Whether the Plaintiff was a purchaser of the suit property or a tenant as alleged by the 1st Defendant.*
- b. *Whether the distress for rent levied upon the Plaintiff was lawful.*
- c. *Whether the Plaintiff is entitled to a temporary injunction.*
- d. *Whether the Plaintiff is entitled to a mandatory injunction reinstating him to the suit property.*

54. With regard to the first issue, it is not in dispute that the parties herein had agreed that the Plaintiff would take possession of the suit property and his legal fees would be offset against the purchase price. It is submitted on behalf of the 1st Defendant that the maximum set-off amount was capped at **Kshs. 29,960,000/=**. Nevertheless, it has been established that the 1st Defendant issued four (4) credit notes for the total amount of **Kshs. 37,678,919.24**, each of which stated on their body that they were issued in respect of the purchase of the suit property. Therefore, the 1st Defendant was not strict in terms of the set-off amount.

55. The 1st Defendant has alleged that it did not execute the Sale Agreement and that the same is a forgery. It is also the 1st Defendant's contention that the Plaintiff obtained possession of the suit property unlawfully by subjecting it to undue pressure. As it is, the alleged forgery is under police investigation and at this interlocutory stage, the Court cannot establish that the sale of the suit property was tainted with fraud and illegality based on affidavit evidence alone. There is need for more evidence either documentary or *viva voce* evidence. The determination of this issue must abide the full hearing of the suit.

56. In respect of the foregoing, it can only mean that from the onset the Plaintiff herein was to be a purchaser and not a tenant. In fact, the 1st Defendant does not deny that they intended to sell the suit property to the Plaintiff. On the other hand, there is no substantive evidence to indicate that the Plaintiff herein was a tenant. Since there was no tenancy arrangement, it only means that the Plaintiff was a purchaser who was in the process of acquiring ownership of the house. Therefore the argument that the tenancy was by presumption cannot be taken at this stage. It requires full hearing of the suit.

57. The second issue is whether the distress for rent levied upon the Plaintiff was lawful. I agree with the 3rd Defendant that the Distress for rent was carried out within the confines of the law to the extent that it was carried out on the basis of the Court order issued on **9th May 2012** and an instruction letter from M/S Odhiambo & Weda Advocates. However, having found no clear evidence of a tenancy arrangement between the Plaintiff and the 1st Defendant, this Court is of the view that the 1st Defendant was not entitled to levy distress on the Plaintiff's goods either by itself or its Agents.

58. Therefore, the 3rd Defendant acting as the agent of the 1st Defendant should return all goods that were carted away.

59. The decision to visit the suit property was taken on the morning of 22nd June 2012. During the visit it was established that several non-attachable goods were inside the suit property. The Plaintiff averred that some of the goods found in the suit property during the said visit were returned to the suit property afterwards. There is no evidence to support the Plaintiff's allegation. Nevertheless, what matters is that it was established that the 3rd Defendant did not attach non-

distrainable goods.

60. The Plaintiff has also prayed that this Court grant him a mandatory injunction reinstating him to the suit property. The Plaintiff relied on the case of **PROFESSOR WASHINGTON JALANG'O OKUMU VS BOFAR LIMITED [2005] Eklr.** In refuting the Plaintiff's case for a mandatory injunction, the 1st Defendant cited **NBI HCCC NO. 2552 OF 1998 COMMUNITY SHELTER WORKS LIMITED VS ZEPHANIA MOGUNDE ANYIENI** and **MALINDI AIR SERVICES AND ANOTHER VS HALIMA ABDINOOR HASSA, CIVIL APPEAL APPLICATION NO NAI 202 OF 1998.**
61. The principles of granting a mandatory injunction are stated in the case of **Locabail**. It is not in dispute that the 1st Defendant is still the registered proprietor of the suit property. There is no lease registered in favour of the Plaintiff herein. It is the 1st Defendant's contention that there is no valid and legally binding agreement for lease between it and the Plaintiff to give effect to the sale and that consequently, the said sale has been repudiated due to illegal, fraudulent and fundamental breaches committed by the Plaintiff. While the issue of fraud and illegality surrounding the Agreement of sale has not been conclusively determined, I think it is clear to both parties that the 1st Defendant is still the registered proprietor of the suit property. It is evident that the Plaintiff was still in the process of acquiring ownership.
62. However, it is worthy to note that the main dispute herein is not that of ownership but as to whether the Plaintiff is a purchaser or tenant of the suit property. It has already been established that the Plaintiff was an intended purchaser. From the foregoing, it is also apparent that the intended sale did not come to its fruition.
63. The sale agreement that the Plaintiff seeks to rely on required that the purchase price be paid in full for the Plaintiff to take possession. That has not been done to date. In fact the parties herein differ on the value of the suit property. The Plaintiff urges that the balance of the purchase price be set-off from the legal fees due and owing to him by the 1st Defendant. However, the said fees are in dispute and the Plaintiff is yet to file the Bill of costs for taxation. Therefore, this Court cannot rely on the argument of set-off against the Plaintiff's legal fees. In view of the foregoing, it cannot be said that the Plaintiff has fulfilled part of his bargain to entitle him to possession of the suit property. This is still a contested issue which must abide the full hearing of the suit.
64. In conclusion the evidence before the Court at this stage shows that the Plaintiff has a *prima facie* case in terms of **Giella vs Cassman Brown**. This is so because he first entered into the current arrangement with the 1st Defendant as a purchaser and not as a tenant. If his tenure system changed in the course of time as alleged by the 1st Defendant, then this is a matter to be heard and determined in the full hearing of this matter during which the Court will establish the process of that alleged change of the tenure system, rent payable, period of tenancy and other applicable terms of the tenancy.
65. Secondly, damages would not be proper remedy for the Plaintiff because the Plaintiff appears to have made the suit property to suit his personal taste. He has become attached to the house through constant supervision, alteration and hope of owning it. Therefore, if the house is sold and it turns out that the sale was improper, damages would not adequately compensate the Plaintiff.
66. Thirdly, the Court is not in doubt but if it were, the balance of convenience at this stage is in favour of the Plaintiff. On the other hand it is also highly contested what amount of money the Plaintiff has paid towards the alleged sale. The Plaintiff's interest on the suit property is based on sale of the same, yet we cannot at this stage know how much has been paid and what is outstanding. On this ground, the Court cannot reinstate the Plaintiff to the house to which the 1st Defendant has title.
67. In the upshot, the Plaintiff's application is allowed in the following terms:-

- a. *That pending the hearing and determination of this suit, a temporary injunction be and is hereby issued restraining the Defendants whether jointly and/or severally by themselves or through their officers, agents, servants and/or employees or any other person from occupying, using, selling, leasing, transferring, charging, pledging, alienating, tampering with, altering or otherwise howsoever dealing with House Number 1D Kihingo Village (Waridi Gardens) constructed on Land Reference Number 27754 Nairobi.*
- b. *That the 3rd Defendant and his principal, the 1st Defendant, whether jointly and/or severally by themselves or through their officers, agents, servants and/or employees or any other person to return all the goods that were attached and carted away from the Plaintiff's house on 11th May, 2012 at the cost of the 1st and 3rd Defendants.*
- c. *THAT the costs of carrying out the purported distress be borne by the 1st and 3rd Defendants/Respondents.*
- d. *THAT accounts be taken as between the Plaintiff and the 1st and 2nd Defendants.*
- e. *THAT parties shall bear their own costs of the application.*

DATED, READ AND DELIVERED AT NAIROBI

THIS 5TH DAY OF DECEMBER 2013.

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Karani holding brief for Regeru for the Plaintiff

Wakla for the 1st Defendant

Nyamunge for the 2nd Defendant

Mugoye for the 3rd Defendant

Teresia – Court clerk